Paramount Parks, Inc. d/b/a Star Trek: The Experience *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, AFL–CIO affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO *and* Cynthia Veto *and* Roger Guinn *and* John Stepp. Cases 28–CA–15464, 28–CA–15549, 28–CA–15592–4, and 28–CA–15793

June 6, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On August 28, 2000, Administrative Law Judge James L. Rose issued the attached decision.[1] The General Counsel and the Charging Party, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, AFL–CIO, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (Culinary Workers Union or CWU), filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions,[2] cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as further discussed below, and to adopt the recommended Order as modified and set forth in full below.

1. The Culinary Workers Union has excepted to the judge's dismissal of the allegations in the fourth consolidated complaint (complaint) alleging that the Respondent violated Section 8(a)(1) of the Act by: (1) maintaining and enforcing a rule in its employee handbook entitled "Non-Disclosure of Information"; and (2) maintaining and discriminatorily enforcing a rule in its employee handbook regarding the solicitation and distribution of literature which provides, inter alia, that "[o]ff-duty associates are not to remain on or return to the Company premises, except for regularly scheduled work shifts or Company-sponsored events."

These complaint allegations are fully encompassed by the informal Board settlement agreement between the Respondent and the Teamsters. The settlement agreement specifically provides that the Respondent will advise its employees, in writing, that these handbook rules "are no longer being maintained" and that its employees "are free to discuss information relating to wages, hours and working conditions with each other." The Respondent also by the settlement agreement is required to post a Board notice for 60 days containing this assurance.[3] The complaint allegations regarding the Respondent's handbook provisions have thus been fully remedied by the settlement agreement. For this reason, we find no merit in the CWU's exceptions, and we affirm the judge's dismissal of the relevant complaint allegations.

2. The Respondent has excepted to the judge's finding that it violated Section 8(a)(3) and (1) of the Act by refusing to allow Tania Lonkouski to rescind her resignation from employment. We agree with the judge's finding, for the reasons set forth by him and those set forth below.

Under the test set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983),

[1] We have amended the caption to reflect the fact that on January 11, 2001, the Board, by its Associate Executive Secretary, issued an order approving the General Counsel's supplemental motion to sever Cases 28–CA–15592, 28–CA–15926, and 28–RC–5692 and remand these cases to the Regional Director for approval of settlement agreement and withdrawal requests. This settlement agreement was reached between the Respondent and the Professional, Clerical and Miscellaneous Employees, Local Union 995, affiliated with International Brotherhood of Teamsters, AFL–CIO (Teamsters), which filed the charges in those cases. We shall modify the judge's recommended Order to reflect the settlement agreement and withdrawal of charges in these cases. Under the terms of the January 11, 2001 Order, Cases 28–CA–15464, 28–CA–15549, 28–CA–15592–4, and 28–CA–15793 continued under consideration by the Board.

[2] No exceptions were filed to the judge's dismissal of the allegations in Cases 28–CA–15549, 28–CA–15592–4, and 28–CA–15793. In Case 28–CA–15464, no exceptions were filed to: (1) the judge's finding that the Respondent, by its floor supervisor Matthew Timothy, violated Sec. 8(a)(1) of the Act by threatening employees on various occasions with loss of wages and other reprisals including layoff if employees selected the Culinary Workers Union as their representative; and (2) the judge's dismissal of the allegation that the Respondent, by its assistant kitchen manager William Artis, violated Sec. 8(a)(1) by interrogating employees.

[3] The notice to be posted by the Respondent further contains the following provisions:

> WE WILL NOT maintain any provision in our employee handbook or our "Non-Disclosure of Information" policy in such a manner as to prohibit our employees from discussing information related to wages, hours, and working conditions with each other.
>
> WE WILL NOT enforce our no-solicitation/no-distribution policy in an overly broad or discriminatory manner so as to ban Union solicitations by our off-duty employees during nonworking time or in noncustomer areas or ban distribution of Union-related materials from nonworking areas of our premises.
>
> WE WILL NOT discriminatorily enforce the provision in our employee handbook which requires our employees to leave our premises except for regularly scheduled work shifts or company-sponsored events.

In addition, the settlement requires the Respondent to "comply with all the terms and provisions" of the notice.

the Board first requires the General Counsel to establish by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. See, e.g., *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The record here shows that Lonkouski was the observer for the CWU at the authorization card check conducted on August 12, 1998,[4] which resulted in the Respondent's recognition of the CWU as the representative of a bargaining unit of its food and beverage employees. The judge found, and the Respondent does not dispute, that "[t]here is no question that Lonkouski was an active supporter" of the CWU. The Respondent's knowledge of Lonkouski's prounion activity is clearly established based on her public and prominent role as the CWU's card check observer. Further, there is no doubt that the Respondent expressed hostility toward unionization. Thus, as noted above at footnote 2, the Respondent has not excepted to the judge's finding that the Respondent, by its Floor Supervisor Matthew Timothy, on various occasions unlawfully threatened employees, including Lonkouski, with loss of wages and other reprisals including layoff if employees selected the CWU as their representative.

Finally, we find that antiunion motivation may reasonably be inferred from the inconsistency between the reason the Respondent gave Lonkouski for denying her request and the Respondent's actual practice on rescission of resignations.[5] On September 22, Lonkouski resigned her employment position and gave 2 weeks' notice to Restaurant Manager Michael Muller. About 1 week later Lonkouski asked Muller if she could rescind her resignation. He replied that it would be no problem if her termination papers had not been processed. Lonkouski then checked on this matter with Laverne Newhouse, Respondent's human resources coordinator responsible for processing paperwork for incoming and departing employees. Newhouse testified that the paperwork for the resignation had not yet been processed at the time Lonkouski made her inquiry. Newhouse directed Lonkouski to speak with Human Resources Director Fran Bailey. Newhouse informed Bailey that Lonkouski would be coming to see Bailey and that Lonkouski wanted to rescind her employment resignation. Bailey remarked, "[W]e don't want her to take it back" and asked Newhouse if the paperwork had been completed to which Newhouse responded, "No." Lonkouski's supervisor, Simon Liu, testified that he checked with Bailey on this matter and was told by her that "we don't rescind resignations" and "we just accept resignations." Later that day Lonkouski was informed by Liu and Restaurant Manager Muller that it was no longer the Respondent's policy to accept the rescinding of resignations, a position, as discussed above, contrary to what the Respondent acknowledges is its actual practice. This inconsistency is further evidence from which we infer antiunion motivation.

We find that, with the evidence summarized above, the General Counsel has carried his burden of demonstrating that Lonkouski's protected union activity was a substantial or motivating factor in the Respondent's refusal to permit her to rescind her resignation. The burden accordingly shifts to the Respondent to prove that the same action would have taken place even in the absence of the protected union activity.

The Respondent failed to meet this burden. The Respondent, in its brief, asserts that it did not permit Lonkouski to rescind her resignation because she was not in a position necessary for its business and because she was encouraging employees to leave the Respondent to go to work with her at another Las Vegas area hotel. The record does not establish, however, that the Respondent relied on the latter reason in making its decision. Human Resources Director Bailey did not cite that reason in her conversation either with Laverne Newhouse or Simon Liu. Nor was it relied on as the reason in the conversation on this matter between Bailey and Respondent's senior vice president for human resources and general counsel Johnny Taylor.[6]

Further, the Respondent expressly acknowledges that its policy on rescission of resignation is based on all the circumstances involved, with no one factor being dispositive. Yet Taylor's testimony shows that the Respondent, at the time it made its decision regarding Lonkouski, cited only one reason for refusing rescission of her resignation—that she was not in a critical posi-

[4] All dates are in 1998.

[5] The judge found that the Respondent's practice is to consider an employee's request to rescind his or her resignation from employment on a case-by-case basis. The judge described this approach as "essentially a non-policy," since it allowed the Respondent such broad discretion. The Respondent in its brief to the Board effectively agrees with the judge's finding, characterizing its practice as one of "'ad hoc' consideration" and that its "policy was to review an employee's request to rescind on a case by case basis; sometimes employees were allowed to rescind (particularly if they were in hard to replace positions), sometimes the employee was not allowed to rescind. In sum, it depends on the circumstances of the case."

[6] Rather, Taylor testified that he asked Bailey "*one question*:" Is "Lonkouski in a critical position and for business reasons do we need her?" Bailey replied in the negative. Taylor replied: "[T]hen we do not allow her to rescind her resignation[.]"

tion—without evaluating other pertinent circumstances. Further, the Respondent did not tell Lonkouski that this was the reason for its decision. Rather, the Respondent told her a reason that it now admits is false: that it does not allow resignation of employment to be rescinded. The judge also found that the Respondent allowed two other individuals employed at the Star Trek facility where Lonkouski was employed to rescind their resignations of employment.[7]

Based on the foregoing, we find that the Respondent has failed to prove that it would have refused Lonkouski's request to rescind her resignation even in the absence of her union activity. Consequently, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act.

3. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by confiscating a cake displaying a prounion message. For the reasons set forth below, we find, contrary to the judge, that the Respondent's conduct violated Section 8(a)(1) of the Act.

Tania Lonkouski's last day of employment following the Respondent's unlawful refusal to allow her to rescind her resignation was October 2. On that date, Lonkouski brought to work to share with her coworkers a cake decorated as a Culinary Workers Union authorization card and inscribed "Goodbye Norma Rae." ("Norma Rae," a reference to a movie heroine involved in union organizing, was the nickname given to Lonkouski by her coworkers because of her prounion activity.) Human Resources Director Bailey told Lonkouski that she would have to "smear the cake over" or "throw it away, that it was extremely inappropriate . . . for the workplace." Lonkouski refused. Bailey took the cake away and did not return it.

Lonkouski's unrebutted testimony establishes that employees had the practice of bringing a cake to the Respondent's workplace to share with coworkers to mark an employee's last day of work, or inscribed, e.g., "Happy Mother's Day" to celebrate a holiday. There is no evidence that these cakes were taken or otherwise disturbed by the Respondent. Lonkouski's cake was placed in the same location as these other cakes.

These facts establish that the Respondent's conduct was discriminatory. The sole reason the Respondent objected to Lonkouski's cake was because it displayed what was considered a prounion message. This is clearly established because the Respondent was willing to allow the cake to remain if the inscription was removed or "smeared over." Indeed, the record shows that the Respondent's past practice was to permit employees to bring cakes to work to share with their colleagues in celebration of special events, such as Mother's Day or, as in this instance, an employee's last day on the job. By treating Lonkouski's cake differently because it displayed a prounion message, the Respondent acted in a disparate manner and violated Section 8(a)(1) of the Act.[8]

[7] One of these individuals was Allan Blanchard, a food server. The Respondent did not object at the hearing to the introduction of evidence regarding Blanchard.

[8] In recommending that the complaint allegation be dismissed, the judge relied on the fact that the cake was placed in a work area. The record shows, however, that Lonkouski placed her cake in the same area where the Respondent had permitted other employee cakes to remain. The flaw in the judge's analysis is that he overlooked the evidence of disparate treatment.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Paramount Parks, Inc. d/b/a Star Trek: The Experience, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of wages and other reprisals if employees choose the Union as their bargaining representative.

(b) Refusing to allow employees to rescind their resignation of employment in order to discourage union activity.

(c) Discriminatorily confiscating an employee's cake displaying a prounion message.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tania Lonkouski full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Tania Lonkouski whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to rescind the employment resignation of Tania Lonkouski, and within 3 days thereafter notify Tania Lonkouski in writing that this has been done and that the unlawful refusal to rescind her employment resignation will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its place of business in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of wages and other reprisals if you choose Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, AFL–CIO, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO as your bargaining representative.

WE WILL NOT refuse to allow you to rescind your resignation of employment in order to discourage union activity.

WE WILL NOT discriminatorily confiscate an employee's cake displaying a prounion message.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tania Lonkouski full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tania Lonkouski whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to rescind the employment resignation of Tania Lonkouski and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful refusal to rescind her employment resignation will not be used against her in any way.

PARAMOUNT PARKS, INC. D/B/A STAR TREK: THE EXPERIENCE

Nathan W. Albright, *Benjamin W. Green, Esqs.* and *Jerry Schmidt, Esq*., for the General Counsel.

Bradley W. Kampas and *Mark Theodore, Esqs.*, of San Francisco, California, and *Johnny C. Taylor, Esq*., of Charlotte, North Carolina, for the Respondent.

Adam Stern, Esq., of Los Angeles, California, for Local Union 995.

Richard G. McCracken, Esq., of Las Vegas, Nevada, for Local Unions 226 and 165.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Las Vegas, Nevada, on 11 days between February 1 and March 16, 2000, on the General Counsel's consolidated complaint which alleged multiple violations of Section 8(a)(1), (3), (4,) and (5) of the National Labor Relations Act (the Act). In part, the General Counsel contends that the Respondent be ordered to bargain with the Professional, Clerical and Miscellaneous Employees, Local Union 995, affiliated

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with International Brotherhood of Teamsters, AFL–CIO (the Teamsters). Consolidated with the complaint are the objections to the rerun election held on March 4, 1999, in Case 28–RC–5692 filed by the Teamsters, along with the challenged ballots in that election.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that no bargaining order should issue because the Teamsters never represented an uncoerced majority of its employees.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the business of operating several theme parks in various States and in Canada, including a facility at the Las Vegas Hilton Hotel styled Star Trek: The Experience (STTE). During the course and conduct of this business, the Respondent annually derives gross revenues in excess of $500,000 and annually purchases and receives directly from points outside the State of Nevada, goods, products, and materials valued in excess of $50,000. The Respondent admits and I conclude that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO (the Culinary Workers), and Professional, Clerical and Miscellaneous Employees, Local Union 995, affiliated with International Brotherhood of Teamsters, AFL–CIO are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Factual Outline

Star Trek: The Experience is a kind of amusement ride located in the Las Vegas Hilton Hotel. In brief, guests are escorted into the attraction by two actors playing the part of Hilton employees and are "beamed up" to the "Enterprise" by means of lighting and staging. They are then put on a shuttle simulator and are taken for a ride. The experience ends with the shuttle "crashing" in the Hilton Hotel basement. During the ride, actors playing the parts of Star Fleet officers recite lines according to a predetermined script. At the end of the ride, guests are escorted to a promenade of retail shops and a restaurant. Throughout the promenade are other actors playing the parts of aliens (Klingons and Ferengi). The ride takes about 20 minutes and the facility is equipped to do two at a time. Typically, the Respondent runs about 80 shows a day.

The actors playing the parts of Hilton employees and Star Fleet officers are assigned to one of four "rotations" and begin each workday playing a specific part. After a time, according to a predetermined plan, each actor in a particular rotation will bump to another part or to a break. When assigned to a specific role, an actor must say precise lines at a specific time and place. The aliens, however, have no set lines. They walk around the facility outside the attraction ride, talking with guests, but staying in character.

In late 1997 the Culinary Workers began an organizational campaign among the Respondent's food service employees. This culminated in a card check on August 12, 1998,[1] and recognition by the Respondent in the following unit, admitted to be appropriate for purposes of collective bargaining under Section 9(b) of the Act:

> All non-supervisory food and beverage employees and porters employed by the Respondent.

It alleged that during the course of this organizational campaign, and after recognition, the Respondent committed various violations of Section 8(a)(1), (3), and (5) of the Act.

In late 1998, the Teamsters began an organizational campaign among the Respondents actor/performers. An election was held on December 14. The tally of ballots shows that of approximately 100 eligible voters, 46 were casts for the Teamsters, 35 against, and there were 15 challenged ballots.

Since the challenges were potentially determinative, they were to be impounded according to the Board's procedures and opened after a ruling on each voter's eligibility. Unfortunately, and through no fault of the Teamsters or the employees who sought union representation, the Board agent mishandled the challenged ballots. Though there was no evidence that in fact anything untoward occurred, the election was set aside. The Regional Director concluded that such was necessary in order to avoid the appearance of impropriety.

Thus a second election was held on March 4, 1999. The tally of ballots shows that of approximately 85 eligible voters, 33 voted for the Teamsters and 40 against, with 14 challenged ballots. Again the challenges were determinative and the Teamsters filed objections to the election. Although some alleged objectionable conduct is beyond the complaint allegations, counsel for the Teamsters stipulated that all the alleged objectionable conduct is in the complaint and he offered no additional evidence. Thus, the report on objections will consider only those unfair labor practices found occurring after the Teamsters petition was filed.

The Respondent is alleged to have engaged in multitudinous violations of Section 8(a)(1), (3), (4), and (5) of the Act. It is also alleged that because the Teamsters had valid authorization cards from a majority of actor/performer employees, a bargaining order ought to issue under the authority of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). The facts and analysis of each alleged violation of the Act will be treated separately below.

B. Analysis and Concluding Findings

Many of the alleged violations of Section 8(a)(1), as well as company knowledge of certain employees' union sympathy, are dependent on whether leads Steven Biggs, Gary T. Bondurant, Federico Flores, Markus Kublin, David Nelson, Chad Randle, and Kerstan Szczepanski were supervisors within the meaning

[1] All dates hereafter are in late 1998 or early 1999 unless otherwise indicated.

of Section 2(11) and agents of the Respondent within the meaning of Section 2(13) of the Act.[2] Their agency status, if any, is dependent on whether they were supervisors. Since the General Counsel is the proponent on this issue, he has the burden of proof that the leads are supervisors by a preponderance of the credible evidence. *Chemical Solvents, Inc.,* 331 NLRB 312 fn. 3 (2000). This is a close question, but on balance I conclude that the General Counsel did not sustain his burden of proof.

Section 2(11) defines a supervisor as:

> Any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

There is no evidence that any of the leads had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or adjust grievances (or effectively to recommend such action). Thus they were supervisors if, and only if, it can be found that they responsibly directed other employees where such direction "is not of a merely routine or clerical nature, but requires the use of independent judgment." In short, what the leads did during the workday is the primary consideration and I find the evidence lacking that they responsibly directed other employees.

The General Counsel offered some evidence that the leads possessed indicia of supervisory authority—they were paid $1 per hour more than other employees; they used an office, the operations leads wear street clothes and not uniforms; they kept notes of their observations; they attending management meetings; the operations leads perform preperformance safety checks and power up the unit; the leads went to a training session at a property in California. But, as noted by counsel for the Respondent, these are secondary indicators of supervisory status and do not answer the question of whether the leads responsibly direct other employees.

Under the job responsibilities section of the lead job posting, there appears to be an indication that they direct other employees. However, as the Board has noted, "Mere paper authority does not confer supervisory status." The test is what the purported supervisor does. *F. A. Bartlett Tree Expert Co.,* 325 NLRB 243 fn. 1 (1997).

The basic duty of the leads is to observe, critique, and correct the performing employees. There are typically two operations leads on a shift for 20 actors, and one or more supervisor/managers. The leads spend most of their workday observing performances, and they make extensive notes in the "Lead Log" and occasionally make out an "Observation Report" for an employee, which is also signed by an admitted supervisor. For extremely credible work, they will give the employee a "positive contact" report. They are, in short directors of the 80 some performances each day. But they do not have the authority to alter the script or the blocking (the timing and place where lines are delivered).

In this respect, I conclude that their duty is analogous to the producer/directors in *Westinghouse Broadcasting Co.,* 216 NLRB 327 (1975), and the directors and choreographers in *Musical Theater Assn.,* 221 NLRB 872 (1985), where the Board observed that "their work is essentially limited to directing the artistic aspects of the performers' work."

Here the critique of actors is within the strict confines of the script. Their use of judgment is confined to the artistic aspect of the performance. They do not responsibly direct the work force.

The character leads, of which there is typically one per shift, are in costume and as with the other characters, interact with guests. As with the operations leads, they do observe, critique, and correct other character employees. Again, however, they do so focusing on the artistic aspects of the employees' work.

The leads fill out the "pre-opening operations safety checklist" and, as noted, the leads make out observation reports and every day make notes on the "Lead Log" of what went on during their shifts, along with concerns and suggestions. But in doing so, the leads are really only performing a "reportorial function" which does not prove that they exercise discretion in directing employees. *Passavant Health Center,* 284 NLRB 887 (1987). Any written discipline is in fact given by an admitted supervisor—e.g., the manager or assistant manager of operations, assistant manager of show, and so forth.

Whatever limited authority the leads have in assigning employees to a particular spot in a rotation, and even allowing an employee to leave early are routine, sporadic, and do not indicate the use of independent judgment. Such limited exercise of authority is insufficient to confer supervisory status. *Lincoln Park Nursing & Convalescent Home,* 318 NLRB 1160 (1995) (the maintenance supervisor not a statutory supervisor).

Finally, the fact that the leads receive $1 per hour more than other employees is merely a reflection of the Respondent's determination that they possess greater skills than the others and does not prove supervisory status. *Brown & Root, Inc.,* 314 NLRB 19 (1994).

I therefore conclude that at all times material, the leads were not supervisors within the meaning of Section 2(11) of the Act. As there is no evidence that they otherwise were agents of the Respondent, I shall recommend that those paragraphs of the complaint alleging that they engaged in unfair labor practices be dismissed. They are paragraphs: 8(c), (f) (which was withdrawn), (l), (m), (n) (which was withdrawn), (u), and (v).

1. The alleged violations of Section 8(a)(1)

a. Interrogation by William Artis

It is alleged in paragraph 8(a) that Assistant Kitchen Manager William Artis on an unknown date in June 1998 unlawfully interrogated employees. This issue was not briefed by either party**.** Artis did not testify and I find no evidence that the event alleged occurred. Accordingly, I will recommend that paragraph 8(a) be dismissed.

[2] It is alleged and denied that April Hebert was a supervisor and her ballot was challenged. There are no substantive allegations concerning her, and minimal evidence of her status at any material time. In light of my conclusion to set aside the election, the allegation concerning her status is moot.

b. Threats by Matthew Timothy

In paragraph 8(b) it is alleged that on various dates between May 2 and August 12, 1998, Matthew Timothy unlawfully threatened employees with termination and other reprisals. The Respondent denied the substance of this allegation as well as Timothy's supervisory status.

Simon Liu, the director of food and beverage during the material time here, and an admitted supervisor, testified that Timothy was a floor supervisor with the authority to discipline, assign, and direct employees. He also testified that Timothy spent "most of his week being a server." I conclude from Liu's testimony that in fact Timothy had supervisory authority, notwithstanding that he also performed the same work as rank-and-file employees.

Food server Tania Lonkouski[3] testified that on various occasions between the time the Culinary union activity started and the card check Timothy "would bring up that if we—if we Star Trek went union, there would be no teamwork. We would lose our 17 percent gratuity on parties of six or more, people would be laid off, many different things at different—." She testified that he "said that an awful lot, no 17 percent, he repeated a lot."

I find in these statements an implicit threat of loss of benefits should employees exercise their Section 7 rights. This is not the kind of statement protected by Section 8(c) of the Act but rather was a threat, repeatedly made, in violation of Section 8(a)(1).

c. No-solicitation and distribution rule

It is alleged in paragraph 8(d) and paragraph 8(e)(2) that the Respondent maintained and discriminatorily enforced an overly broad no-solicitation and distribution rule. Presumably, the 8(d) allegation is that the rule set forth in the "Associate Handbook" is unlawful on its face, and the allegation in paragraph 8(e)(2) is that Director of Operations William Ossim unlawfully enforced the rule. The handbook provides:

> 1. *No solicitation of any kind on Company premises during work time.*
>
> 2. *No distribution of literature or printed matter on Company premises during work time.*
>
> 3. *No distribution of literature or printed matter in work areas at any time.*
>
> 4. *No solicitation or collection of contributions or distribution of written or printed matter at any time by non-Associates on Company premises.*
>
> 5. *Off-duty Associates are not to remain on or return to the Company premises, except for regularly scheduled work shifts or Company-sponsored events.*
>
> 6. *The Company maintains bulletin boards to communicate Company information to Associates and to post notices required by law. These bulletin boards are for the posting of Company information and notices. Only persons designated by the Human Resources Department may place notices on, or take down material from, the bulletin boards. The unauthorized posting of notices, photographs, or other printed or written materials on bulletin boards or any other Company property is prohibited.*

Work time, as referenced above, does not include meal and break periods.

Contrary to the apparent assertion of the General Counsel, I conclude that the rule as published is presumptively valid. *Our Way, Inc.,* 268 NLRB 394 (1983).

In support of the 8(e)(2) allegation, Tracy Jordan testified that in August or September, in a meeting with Ossim and Assistant Manager of Operations Jennifer Ogden he was told by Ossim that "he had been made aware that I was distributing union cards on Star Trek premises and asked that I refrain from doing so as it was not company policy to disseminate union material on the premises." The General Counsel alleges this is discriminatory enforcement of the no-distribution rule since Ossim referred only to union cards and not other matters. I disagree. By his testimony, Jordan was only distributing cards. Cards were the subject of discussion, not anything else.

Jennifer Vandenberg testified that Human Resources Director Felix Massey said to her in casual conversation that everything "we post or hand out has to be approved by HR. We're not allowed to post anything on the board [in the break room] without HR and then we have a no solicitation policy." She went on to testify that "The walls were wallpapered with anti-union information." "I mean, there was so much antiunion information on the wall you couldn't see the wall. Everywhere in the break room, on the employee board, in the hallway, outside of the ops office."

The impression left by this testimony is that only antiunion literature was posted and such was allowed by the Respondent. Vandenberg's testimony about the massiveness of antiunion postings was not corroborated; however the Respondent does not deny that certain antiunion notices were posted in the breakroom (which Massey had taken down) as well as an anti-union letter written by Lead Steven Biggs.

The Respondent argues that it has the right to post antiunion literature notwithstanding a no-solicitation/no-distribution rule and that to do so is not per se violative of the Act, citing *NLRB v. Steelworkers (Nu Tone, Inc.),* 357 U.S. 357 (1958). There is no evidence of who may have posted this literature. Further, Massey in fact had one such poster taken down. On these facts, I conclude that the General Counsel did not establish a violation of the Act as alleged in paragraph 8(e)(2).

d. Creating the impression of surveillance

It is alleged in paragraph 8(e)(1) that Ossim created the impression of surveillance when he told Jordan that he had learned Jordan was passing out union cards. Mere knowledge of employees' union activity is not sufficient to establish that an employer created the impression of surveillance. To establish a violation, it must also be shown that this knowledge could only have come from surveillance. Thus to tell an employee that the Respondent had heard he was passing out cards, particularly where that activity took place on company property, does not without more make out a violation of the Act. *South Shore Hospital,* 229 NLRB 363 (1977).

[3] In the complaint, and sometimes in the record her name is spelled, Tayna Lonkowski.

e. Threats by Scott S. Miller, Diana Tennyson, and Christy Snearing

Paragraph 8(g) alleges that on September 22, Miller, Tennyson and Snearing impliedly threatened employees with unspecified reprisals because they engaged in protected, concerted activities. Presumably this allegation is based on the testimony of Cynthia Veto, since she is the only witness who testified to a meeting on September 22 with the three named supervisors. I find nothing in her testimony to support this allegation and I will recommend it be dismissed.

f. Rescinding the retroactive application of attendance policy

It is alleged that sometime in September or October, the Respondent rescinded the retroactive application of an attendance policy initiated on September 7 in order to dissuade its employees from supporting the Teamsters.

There is no question that on September 7 the Respondent made its attendance policy retroactive, and that such was rescinded. Johnny Taylor, senior vice resident of human resources and administration, testified that he became aware of this retroactive application when an employee called him in Charlotte telling him that the "policy had been distributed about two days ago and she was complaining about it." He then called Fran Bailey, whom he identified as the human resources director at the time, asked her to explain what was going on and told her to rescind the retroactive application.

The General Counsel argues that rescission of the retroactive application was a benefit to employees during an ongoing union campaign and was given without justification. Therefore this act necessarily had a tendency to discourage employees from engaging in union activities, citing *Wise-Pak Foods,* 319 NLRB 933 (1995). I agree that the judge's reasoning there, adopted by the Board, is controlling. He concluded that whether granting a benefit to employees during a union campaign was unlawful depends on whether the Company would have done so in the absence of any union activity. Thus he concluded that granting a wage increase to maintenance employees was based on business considerations and was not unlawful, but changing overtime policy was.

Here I find that the Respondent in fact had a business justification for rescinding the retroactive application. It was patently unfair and employees were complaining. I believe the Respondent would have taken the same action in absence of any union activity. Further, it is questionable whether the Respondent even knew of activity on behalf of the Teamsters when this occurred. The first contact with the Teamsters was in September and the first cards signed in mid-September, yet the credible evidence reflects that the rescission occurred around September 9. In any event, I conclude that changing the policy was not violative of Section 8(a)(1) as alleged in paragraph 8(h).

g. Confiscating a cake displaying a prounion message

On September 22, Lonkouski resigned as a culinary employee. Then on September 30 changed her mind. That the Respondent would not accept this change of mind is alleged violative of Section 8(a)(3), to be discussed below.

Thus Lonkouski's last day of work was October 2. She brought to work, to be shared by fellow employees, a cake decorated like a Culinary Union card and inscribed, "Goodbye Norma Rae."

Lonkouski testified that on other occasions employees have brought cakes to work, noting such events as Mothers' Day, without any problem. She also testified that Bailey took her aside and told her she would have "to smear the cake over or I needed to throw it away, that it was extremely inappropriate and for the workplace." Lonkouski refused, and ultimately Bailey took the cake. The General Counsel alleges that this act of Bailey interfered with employees' Section 7 rights.

Massey testified that he was present when Bailey confronted Lonkouski about bringing the cake to food serving area and that Bailey told Lonkouski she should take the cake to the employee break area. Lonkouski denied that Bailey told her this. In any event, there is no dispute that Lonkouski put the cake in a work area, where food to be served customers is placed.

The General Counsel has directed me to no authority holding that an employer may not, without running afoul of the Act, limit what employees may place in work areas on working time. Bailey's act was tantamount to enforcing a lawful no-distribution rule. I find her act not to have been unlawful. I shall recommend that paragraph 8(i) be dismissed.

h. Nondisclosure rule

It is alleged that the first week of November, the Respondent promulgated and thereafter maintained and enforced the following rule in its employee handbook:

> Non-Disclosure of Information
>
> Associates will neither disclose nor use for their own or another's benefit, during or after their employment, any information not publicly known (after called "Confidential Information") relating to Paramount Parks, its corporate parent Viacom Inc. and their respective subsidiaries and affiliates, (after collectively called "Paramount Parks") unless authorized in writing by the Company.
>
> Confidential information shall include, but not be limited to, Paramount Parks' administrative procedures and manuals; business and financial plans, operations, projections, results and prospects; computer programs; customer, Associate, stockholder and supplier information or lists; research efforts, trade secrets and technical information; trademarks under consideration; terms and conditions of contracts and agreements; as well as any information disclosed to Paramount Parks in confidence by third parties.

First, this language is essentially identical to the "Confidentiality, Conflicts of Interest and Proprietary Property Agreement," new employees were required to sign well before the advent of union activity. Thus I find that it was not, as alleged, promulgated in November, nor do I agree with the General Counsel's argument that the language was promulgated to thwart activity on behalf of the Teamsters.

Further, I disagree that the language is unlawful per se. The test of whether a nondisclosure rule violates Section 8(a)(1) is whether employees would reasonably be led to believe that the rule prohibits discussion of wages and working conditions. *Lafayette Park Hotel,* 326 NLRB 824 (1998); *Super K-Mart,* 330 NLRB 263 (1999).

The General Counsel argues that included in information not to be disclosed is "administrative procedures and manuals," which relate to "working conditions and indirectly, the wages, of Respondent's employees." I disagree. I do not believe employees could reasonably conclude that "administrative procedures and manuals" means, or includes, wages and working conditions. I conclude that the nondisclosure rule does not violate Section 8(a)(1) and I will recommend that paragraph 8(j) be dismissed.

i. Granting two additional holidays

Greg Lawrence testified that when hired he had "the usual federal holidays plus one personal day." Then in December "[w]e were given two additional personal days." This is alleged to have been a grant of benefit to full-time employees in violation of Section 8(a)(1).

The Respondent admits that the holiday schedule was changed, which was noted in a memorandum from Massey dated November 11, which stated that all employees would receive 8 paid holidays each year and employees with more than 1 year of service would also get 3 floating holidays. The change, according to Massey's undenied and generally credible testimony, was in conformity with a new handbook received from corporate headquarters, and dealt only with the way in which holidays were set. There was no change in the number of holidays received by employees. Thus, before the change employees received 10 set holidays and 1 floating holiday. The change was to eight set holidays and three floating ones.

While there was no doubt a change in holiday pay policy after the beginning of the Teamsters organizational campaign, I cannot conclude that the change was either a benefit, or a detriment to employees. The holiday pay benefit remained the same as to the number of total days and employees could, if they wished, take the 2 floating days for the 2 discontinued set days. I conclude that the General Counsel has not established the factual basis for the allegation in paragraph 8(k) and I will recommend that it be dismissed.

j. Delay of performance evaluations and merit pay increases

In paragraph 8(o) it is alleged that on December 21, Vice President and General Manager Tom Rapone informed employees that their performance evaluations and merit pay increases were delayed because of the organizational activity on behalf of the Teamsters. The memorandum reads:

> This note is meant to tell you about a change in the schedule for performance evaluations and merit increases.
>
> Unfortunately, the Teamsters campaign and election combined with having an opening in the HR department makes it impossible to complete the process (of performance evaluations) by January 1, 1999 as originally planned. We now plan to complete the process by January 31, 1999.
>
> *Even though the review process has been delayed, I would like to make it very clear that any performance-based merit pay* increases awarded will be made retroactive to January 1, 1999. [Emphasis in original.]
>
> This delay will affect all members of our team including supervisors, managers, directors and me.
>
> Please accept my sincere apology for this delay. Thank you for your understanding and if you have any questions please talk with you director.

The General Counsel contends that by naming the Teamsters campaign as one reason for the delay in making employees' evaluations the Respondent violated Section 8(a)(1), citing *Feldkamp Enterprises*, 323 NLRB 1193 (1997), and *Laidlaw Waste Systems*, 307 NLRB 52 (1992). Neither of these cases is authority for the proposition asserted.

I find nothing in Rapone's memorandum which is not permissible under Section 8(c). While he noted the organizational campaign and election as being a factor in the delay, he also accepted that the Respondent was responsible for a staffing shortage. But, he emphasized that any merit pay increases would not be affected—they would be made retroactive. I find no threat or unlawful promise of benefit in Rapone's words and I concluded that paragraph 8(o) should be dismissed.

k. Rule prohibiting employee discussions of work-related issues

It is alleged that on January 2, 1999, Massey and Manager of Operations Susan Gaffney orally promulgated an overly broad rule prohibiting employee discussion of work-related issues and concerns. Apparently this allegedly occurred during a session Massey and Gaffney had with employee Tracy Jordan preliminary to his discharge (which will be treated below). Jordan wanted to have fellow employee Jennifer Wallace present as a witness, and, according to Jordan, Massey "indicated to me that it was company policy that matters discussed between employees and management was not privy to—or other employees were not privy to those discussions and that she would not be able to stay."

The General Counsel does not say how this is an unlawful promulgation of an overly broad rule prohibiting employees from discussing work-related issues or concerns. I find it is not, nor can I find anything in the record which would be unlawful under this allegation. Accordingly, I shall recommend that paragraph 8(p) be dismissed.

l. Denying an employee's request for a witness

During the January 2 session discussed above, Massey denied Jordan's request that he be allowed to have Wallace present. This is alleged to have been violative of Section 8(a)(1) because Jordan had reasonable cause to believe that the session would result in disciplinary action being taken against him. The issue is whether the right set for in *Weingarten v. NLRB,* 420 U.S. 251 (1975), is available to employees not represented by a labor organization.

The Board has gone back and forth on this issue, and most recently concluded that in fact nonrepresented employees do have *Weingarten* rights. *Epilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000) (decided following the close of the hearing). At the time of the events here *E. I. du Pont & Co.,* 289 NLRB 627 (1988), was the standard and a nonrepresented employee "does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer's representatives, even if the em-

ployee reasonably believes that the interview may lead to discipline." 289 NLRB at 268.

Nevertheless, as in *Epilepsy Foundation,* I conclude that the right of Jordan to have an employee witness with him should be applied retroactively. Accordingly, I conclude that the allegation in paragraph 8(q) has been established and that by denying Jordan the witness he requested, the Respondent violated Section 8(a)(1).

m. Disparaging employees for engaging in concerted activities

It is alleged in paragraph 8(r) that on January 8, Ossim disparaged employees for engaging in protected concerted activities, specifically making safety complaints. This apparently is to have occurred during a discussion Ossim had with employee Rececca Linton following her filing of a "Notice of Injury or Occupational Disease Incident Report" on January 14. She made this report after fellow employee Vandenburg became ill and was sent to the breakroom. Linton wrote, and testified, that she had a "bitter taste & a headache followed."

In meeting with Ossim, she testified that he questioned her about what happened, "and then he went into something about how every time someone gets sick or lodges a complaint then there's a costly investigation that he has to do and he's been in the business for a long time and the safety of his guests and his employees were always uppermost, and that from that point on if people were going to be lodging these complaints and the investigations came up empty handed then there would be consequences."

Massey testified that Ossim told Linton he had caused an investigation to be made and it was determined that lavender scented aerosol spray had been used in the area, but there had been many complaints about a variety on workplace environmental concerns and they had all been investigated by engineers and OSHA.

I credit Linton and conclude that Ossim's comments to her about her complaint to be disparaging, which in the context of Massey suggesting that employees don't have to work for the Respondent conveys the message that engaging in protected activity is incompatible with continued employment. Such violates Section 8(a)(1). *Fieldcrest Cannon, Inc.,* 318 NLRB 470 (1995). I conclude that the allegation in paragraph 8(r) has been established.

n. Inviting employees to quit

It is alleged that on January 8, Massey invited the Respondent's employees to quit because they engaged in union and protected activities. This allegedly occurred in connection with the safety report that Linton filed after Vandenberg became ill on January 7. During the meeting with Ossim set forth above, Linton testified that Massey said: "they had a business to operate and although they, you know, always try to do better that they will still run the business the way they deem fit and that if people didn't want to abide by that that they didn't have to work here." By this (and disparaging her) the General Counsel argues that the Respondent violated Section 8(a)(1) and (3) of the Act.

Massey testified that "I don't run the company," and he denied telling Linton "if she didn't like it, that she could leave." While Massey may not have made the precise statement counsel asked him, I conclude that Linton's version of the meeting is credible. Whether a statement along the lines testified to by Linton violates Section 8(a)(1) depends on whether it is reasonable to conclude that such a remark would "clearly convey to an employee the threat that management considers engaging in union activities and continued employment essentially incompatible." *Padre Dodge,* 205 NLRB 252 (1973). I conclude that in the context of Linton filing a safety claim which resulted in the meeting with management, such was a reasonable conclusion for an employee to draw. I therefore conclude that the Respondent violated Section 8(a)(1) as alleged in paragraph 8(s).

o. Promise of wage increases

It is alleged that on January 17, then Vice President and General Manager Tom Rapone promised employees wage increases and improved benefits it they rejected the Teamsters. Vandenberg testified that this occurred at the Christmas party on January 17. She testified that she and two other employees were sitting at the bar when Rapone came up and engaged her in a conversation. Rapone "commented to me that I was more attractive than Geri Ryan (from the Star Trek TV series). She asked him why they didn't have more food at the Christmas party. "He asked me what the problem was with the employees. And I said, 'Well, I don't know, you know, what are you talking about.' And I said, 'Why don't you give us all a raise,' kind of jokingly, and he said he was going to give us all a raise if we would quit all the union nonsense. It was a very lighthearted conversation but still kind of disturbing." Rapone was not called as a witness and, necessarily, did not deny the substance of Vandenberg's testimony.

The Respondent argues that since this was flirtatious conversation in the context of a party (and presumably drinking) that it cannot be found to be a promise of benefit in violation of the Act. I disagree. Just as a threat can be made with a smile—the fist inside a velvet glove—so a promise can be made during light banter. The point is, Rapone represented the employer during an ongoing organizational campaign. What he said, even if lighthearted, would reasonably be interpreted by employees as interfering with their Section 7 rights. I conclude that Rapone violated the Act as alleged in paragraph 8(t).

p. Telling an employee to quit

It is alleged that on February 16, Assistant Manager of Operations Jennifer Ogden told an employee who was engaged in union activities she should quit. This is alleged to have occurred following written counseling given to Theresa Leger on February 16 for a safety violation (attempting to close the gullwing door on the shuttle with a wheelchair in the way). On receiving this counseling, Leger wrote her comments which included a statement that a supervisor (Diana Tennyson) was observing the show which made Leger nervous and this caused her to commit the safety violation. "It just happens I was nervous around her but have not been nervous around anyone else including even George Lucas or Patrick Stewart coming thru. Go Figure." She also stated that in 14 months of employment, she had never been observed, a statement which I find incredu-

lous considering the overwhelming evidence that in fact management and leads observed shows many times each day.

Leger testified that when called to discuss this matter with Ogden and Tennyson, Ogden said, "[W]ell I can see that you're not happy working here. You had brought up some concerns regarding your evaluation and nothing will be said on your evaluation. You'll get no answer as to specifics. You've been asking too many questions. Perhaps you should find a job elsewhere. We don't consider you a cooperative with management and a desirable employee."

Ogden testified that she was concerned by Leger's statement to effect that she could not perform her job safely with a member of management present (which despite Leger's contrary assertion, is common). Ogden testified that she told Leger "that I needed her to reevaluate whether or not she was going to be able to safely operate and do her job responsibilities, and then get back to me and let me know that she was going to be able to safely do that." I credit Ogden.

It is certainly possible that Leger could have interpreted Ogden's statement to her as suggesting she find another job. But I conclude that is not what Ogden said. Further, given Leger's statement that she was nervous in the presence of a manager and such caused the safety violation, I believe Ogden's query to her was reasonable. Accordingly, I conclude that the allegation in paragraph 8(w) has not been established and it should be dismissed.

2. Refusal to bargain with the culinary union[4]

It is alleged in paragraph 6(b) that on or about September 7, the Respondent changed its policy and practice of allowing employees to rescind their resignations from employment without notice to or bargaining with the Union.

The Respondent contends that the policy relating to rescission of resignations occurred in July, and before it had a bargaining duty with the Culinary Union. This is based on the testimony of Taylor. According to Taylor this subject arose in late July when the vice president of marketing and communications and PR tendered her resignation, and then 2 days later said she would like to rescind it—that she had given her resignation only to get more money. The CEO had a talk with Taylor about the appropriateness of individuals resigning and then asking for their resignations to be rescinded. The CEO told Taylor to create a policy to which Taylor said he responded:

> Well, you know, here's my idea of the policy, this is what I think we should do. Our policy should be, if, in fact, an individual tenders his or her resignation it's final unless the business needs that person to remain, in which case we will negotiate with that person to come back.

Taylor went on to testify that in this particular case, they needed the individual and did allow her to rescind her resignation. He also testified that throughout the Company, this issue rarely arises—at most once or twice a year.

I have difficulty concluding that in fact there was a change in policy. Taylor, in effect, testified that a resignation is final, unless it isn't. In the case of the marketing vice president, her resignation was not final.

Although the Respondent and the General Counsel agree that there was a change in the resignation policy, I conclude that there was no change. Rescission of a resignation is something which happens rarely and then is handled on a case-by-case basis. Accordingly, I conclude that paragraphs 6(b), (c), and (d) should be dismissed.

3. The alleged violations of Section 8(a)(3)

a. The discharge of Tania Lonkouski

There is no question that Lonkouski was an active supporter of the Culinary Union, and this was known to the Respondent's managers. At a minimum, she was the Union's observer at the card count on August 12. There is also no question that on September 22 she resigned, giving Restaurant Manager Michael Muller 2 weeks' notice. Then about 1 week later, she asked Muller if she could rescind her resignation. He told her that it would be no problem if her termination papers had not been processed, which apparently had not yet happened.

Her attempt to rescind her resignation ultimately reached Taylor, who asked if she was essential. On being advised she was not, he told Bailey that consistent with the policy the Respondent had established in July, Lonkouski could not rescind her resignation.

As noted above, I conclude that the Respondent's newly adopted policy of not allowing one to rescind a resignation is essentially a nonpolicy. The individual allegedly causing the policy change was allowed to continue her employment. Similarly, Liu testified that he learned through Muller that employee Allan Blanchard was allowed to rescind his resignation in the summer of 1998.[5]

Given Lonkouski's known activity on behalf of the Culinary Union, the lack of any objective basis for concluding that she was other than a competent employee, I conclude that the General Counsel established a prima facie showing that Lonkouski was denied continued employment in violation of Section 8(a)(3) of the Act. I further conclude that the Respondent did not meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), to show that the same action would have been taken in the absence of union activity.

Accordingly, I conclude that the Respondent violated Section 8(a)(3) by refusing to allow Lonkouski to rescind her resignation on September 30.

b. The discharge of Cynthia Veto

It is alleged that the Respondent discharged Cynthia Veto on September 25 because of her activity on behalf of the Teamsters. The Respondent contends that Veto was discharged for having falsified a payroll record and notes that she received other corrective counseling just prior to her discharge. The

[4] The allegation in par. 6(a) relating to tests for line cooks, and in pars. 7(a) and (b) alleging that Dante Arancibia was discharged for protesting this were not pursued by the General Counsel since the Culinary Union and the Respondent entered into a non-Board settlement of these issues.

[5] The Respondent argues that this is hearsay and should be rejected. It was not objected to at the hearing and in any event, would be admissible as being a fact assertion against interest by an agent of the Respondent.

General Counsel argues that the other corrective counseling given Veto is irrelevant since the stated reason for her discharge was the alleged falsification, which, apparently, the General Counsel contends did not occur.

Sometime around September 15 Veto submitted a stardate correction notice (payroll correction request) indicating that on September 11 her clock in time should have been 9 a.m. and her clock out time 5 p.m. The payroll department referred this back to Veto's supervisor, noting that she was given an early out on that date after 2 hours and asking whether Veto was owed another 6 hours of pay. She was suspended pending investigation for this apparent attempt to get pay for time she did not work. The micros system showed that she clocked in at 9:21 a.m. but did not clock out; however, the investigation also showed that she was given an early out at 10:45 a.m.

Being active on behalf of a union does immunize one from discipline or discharge. In this case, the record demonstrates that in fact Veto submitted a payroll correction report which was patently false. Such is certainly cause for discipline or discharge. Indeed company records show that other employees have been discharged for falsifying time records both before and after the advent of the union activity here. And given the other corrective counseling Veto received at about the same time, I conclude that the Respondent reasonably would have discharged her even absent her union activity. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3).

c. Rescinding accommodation for Tracy Jordan's reporting time

Tracy Jordan was hired in November 1997 to work the swing shift as an actor/performer. At the time, the swing shift employees went on duty at 4:30 p.m., but were required to attend a pre-shift meeting which, according to Jordan, typically began at 4:20 p.m. Due to the fact that he needed to pick up his children from school and take them to a babysitter, he and management (Theresa Fields) reached an accommodation that he could arrive late, which was set forth in a letter from him to Fields dated April 19, 1998, and placed in his personal file. In the letter he stated: "my arrival time on Wed—Fri will be in the range of 4:20–4:30, but should arrive in time to make shift change."

In the fall of 1998, Ogden confronted Jordan about being tardy and he told her of the arrangement he had with Fields. Ogden said that she would honor it. Then, undisputedly, on November 30, the Respondent changed the starting times for all shifts, such that the swing shift employees would have to arrive at 4 p.m. and be ready for the pre-shift meeting at 4:10 p.m. They would still bump out the day shift at 4:30.

Shortly after the December 14 election, at which Jordan was the Teamsters observer, he was called in to see Massey about his tardiness. (The General Counsel contends this occurred on December 18. The Respondent argues it occurred before the election. Given the timing of subsequent events, I conclude it probably happened after the election. Regardless, Jordan was known to be active on behalf of the Teamsters, having been confronted for passing out authorization cards.) Jordan told Massey that he had an accommodation with Fields and then Ogden about arriving late. In effect, Massey told him that did not matter, he was to be at work on time. They agreed that Jordan would discuss the matter with his wife and determine what options he had. There followed a second meeting in January at which Jordan requested the presence of an employee witness (above), which resulted in his discharge (below).

Notwithstanding that Jordan had been counseled about tardiness even prior to any union activity, it is clear that he did have a special accommodation concerning his arrival time and this was canceled, certainly during the organizational campaign and probably immediately following the first election. Given Jordan's known activity on behalf of the Teamsters, and the lack of any specific reason offered by the Respondent why the accommodation for him needed to be lifted, I conclude that the General Counsel established that by doing so, the Respondent violated Section 8(a)(3) of the Act. I therefore conclude that the allegation in paragraph 7(f) has been sustained.

d. The discharge of Tracy Jordan

In early January, Jordan was again called to meet with Massey and Gaffney. When he arrived he was told that the meeting was in reference to the earlier discussion, whereupon Jordan asked to be excused. He found fellow employee Jennifer Wallace in the breakroom and asked her to come with him to be a witness. Massey told Jordan that he would not be allowed to have a witness since the Teamsters lost the election and did not represent him. Jordan refused to discuss the matter without a witness (which is apparently the allegation of concerted activity in paragraph 7(s)), and also mentioned that he had filed a charge with the Board and thought that ought to be resolved first. Massey acknowledged the charge, but also said that if Jordan did not participate in the meeting without a witness, such would be considered an act of insubordination and he would be subject to discipline. Jordan then asked if he could return to work.

A short time later, Gaffney and Massey and a security guard confronted Jordan, told him he was suspended and escorted him off the premises. On January 5 Gaffney called to tell Jordan that he was discharged for insubordination.

Although the Respondent does not dispute, in general, Jordan's testimony about this event, both the counseling report and termination signed by Gaffney state that Jordan's offense was his refusing to leave his work area and come to the human resources office. For whatever reason, Gaffney misstated Jordan's action. I find that Jordan did come to Massey's office as requested, but there refused to participate without a witness. And it was for this he was suspended and then discharged.

Although at the time of this event, the Board rule did not allow for unrepresented employees to have *Weingarten* rights, the recent holding in *Epilepsy Foundation* clearly establishes that they did. That is, the rule in *Epilepsy Foundation* relates back. An employer denying nonrepresented employees the presence of a witness during a counseling session reasonably thought to result in discipline did so at its peril.

It is further clear that Massey knew Jordan had filed a charge with the Board, and given his treatment of Jordan, I conclude that in part the suspension and discharge were in retaliation for that in violation of Section 8(a)(4). Accordingly, I conclude

that the Respondent violated Section 8(a)(3) and (4) as alleged in paragraphs 7(g), (s), and (t).

e. Refusal to grant Roger Guinn an early out

Roger Guinn testified that on December 25 he asked to go home early. Counsel for the General Counsel did not ask him whether this request was denied. According to the Respondent's records, the request was granted. In fact, of all the employees who worked that day, only Guinn clocked out early. I conclude that the General Counsel did not establish the fact allegation set forth in paragraph 7(h) and it will be dismissed.

f. Refusing Roger Guinn light duty

The General Counsel asserts that Guinn hurt his shoulder on or about December 23, went to a physician, and received a note that he could only perform light duty which he presented to the Respondent on December 27. The note stated, in part, "no straining or lifting more than 5 lbs with the arm for 7 to 10 days."

Guinn was a Hilton Hotel janitor in the performance. When the shuttle "crashes" into the hotel basement, the janitor (who is "clueless") finds the guests and opens the shuttle door by pushing a button. There is no show requirement that he use one hand rather than the other. Nevertheless, he claims that to push the button would have been too much of a strain. The Respondent demonstrated rather conclusively that to push the button would not be a strain, particularly if he used his good arm. Beyond that, I found Guinn's demeanor to be negative and generally I found him not credible. Finally, the Respondent did in fact put Guinn in a different (light-duty) job in early January. I therefore conclude that the Respondent did not deny Guinn light duty, or otherwise treat him unlawfully with regard to his injury. Paragraph 7(i) will be dismissed.

g. Discharge of Roger Guinn

It is alleged that the Respondent unlawfully discharged Guinn on January 20. The Respondent admits that Guinn was discharged on that day, but argues that it was for cause—Guinn left early on January 18 without permission and only January 12 had been given a "final counseling" for poor attendance.

The General Counsel argues that the "final counseling" was necessarily a pretext since of the nine listed absence days, five were excused and one was his day off. Therefore, he only had 3-1/2 points, which was one point less than the minimum for counseling under the Respondent's policy. I disagree. Guinn admits that on September 13 he was given a "final counseling attendance" and was told by Gaffney "that I had like seven points or something." "She just told me how many points I had and that I—if I incurred another point, I would be terminated." He testified that he was told that the points (one for an unexcused absence, one-half for tardy) accrued from the beginning of his employment.

The retroactive aspect of the attendance policy was rescinded. Nevertheless, it is clear, from the documentary evidence as well as Guinn's testimony, that he had a serious attendance problem and that the Respondent kept him on long after he might have been discharged. In such circumstances, I cannot find a pretext.

Notwithstanding the "final counseling" he received on January 12, on January 15 Guinn left work early. He was confronted by Tennyson and claimed that he had permission from the admissions lead. When told that leads do not have the authority to grant early outs, he said that permission came from Ossim, and on this basis, Tennyson allowed him to leave. She later learned from Ossim that he had not given early out permission to Guinn. Thus Gaffney suspended him on January 16.

Former security officer Henry Redding testified that he was present on January 15 when Lead Federico Flores told Guinn that he was free to leave, that his clock out time would be 11:30 a.m. Redding made out a statement to this effect and gave it to Guinn; however, Guinn did not give it to any responsible official of the Respondent. While this testimony tends to corroborate Guinn, it is not at odds with Tennyson's testimony. After being confronted by Tennyson and Flores, Guinn was told he could leave. It was only later that it was determined that Guinn did not have permission.

As indicated above, I do not find Guinn a credible or reliable witness, and even if Redding is credited, I conclude that the Respondent reasonably believed that he left work early on January 15 without permission. This superimposed on his demonstrated poor attendance record, I conclude, was ample justification for the Respondent to discharge him.

It may be that Guinn was a known activist on behalf of the Teamsters. That, however, did not immunize him from reasonable discipline, including discharge. I do not believe that the discharge of Guinn was a pretext to disguise an unlawful motive. I conclude that the allegation that Guinn was discharged in violation of Section 8(a)(3) should be dismissed.

h. Requiring Scott M. Bolt to take a drug or alcohol test

Scott Miller no longer works for the Respondent, but time material here was the assistant manager of show. He testified that on the morning of January 4, he held a make-up rehearsal for all actors who were unable to make the original rehearsal. This included Scott Bolt. However, Bolt was not present for the make-up rehearsal. When Bolt arrived for work that afternoon, Miller approached him to ask where he had been. Miller testified that he smelled what appeared to be alcohol on Bolt's breath. Miller then went to superiors for guidance and ultimately, he pulled Bolt from rotation and they went to Massey's office. Massey testified that he also smelled alcohol and they asked if Bolt had been drinking. He denied that he had. He was asked if he would submit to a blood test, and he agreed.

A few days later the test results came back negative and Bolt was so informed. He was told that he could return to work. Upon returning, he asked for and filled out a 2-week resignation.

Bolt testified that he attended three union meetings, made some comments at them and signed a card. The General Counsel argues that since leads were present at these meetings, Bolt was a known union supporter and since the blood test was negative, it was unwarranted and discriminatory in violation of Section 8(a)(3).

I disagree. Bolt's union activity was, at best, limited and unremarkable. Beyond that, Miller credibly testified that he smelled what he thought was alcohol on Bolt's breath. Since

Bolt had missed a mandatory rehearsal, Miller's suspicion was not unreasonable. Though Bolt denied having been drinking, he did agree to take a blood test (as given other similarly situated employees). The fact that the test turned out negative does not mean that Bolt was discriminated against when asked to take it. Accordingly, I conclude that the General Counsel failed to prove the allegation in paragraph 7(k) of the complaint and it will be dismissed.

i. Written reprimand to Mark Durden

It is alleged that on January 6, the Respondent issued Mark Durden an unwarranted and undeserved written reprimand in violation of Section 8(a)(3). The General Counsel's proof of this allegation is that Durden signed an authorization card and attended two union organizational meetings in the fall of 1998. And, on January 6, his performance was observed by Scott Miller and Chad Randle, after which he was given corrective counseling to the effect that after a year of employment he should be doing better. Therefore, he was told that he would have to be retrained. Durden said "I'll tell you what, I'm off for the next two days. If I'm not back by such and such day, you have my answer." He did not, in fact, return to work.

The General Counsel appears to argue that if one is a known union supporter, demonstrated by his attendance at two organizational meetings, then any criticism of his work, without more, is violative of Section 8(a)(3). I disagree and conclude that there is insufficient evidence discrimination in this incident to justify finding an unfair labor practice. Accordingly, the allegations with regard to Durden will be dismissed.

j. Verbal reprimand to Rebecca Linton

The alleged verbal reprimand to Rebecca Linton is essentially the same allegation as in paragraph 8(r) it was alleged, and found, that Ossim disparaged Linton for having filed a safety complaint. While I credit Linton's version of the meeting she had with Ossim and Massey, I find nothing in her testimony which would suggest that she was reprimanded (other than the disparaging remarks). A reprimand typically is the first step in a chain of discipline. I do not believe such occurred here. Therefore I conclude that the Respondent did not violate Section 8(a)(3) by giving Linton a verbal reprimand as alleged in paragraph 7(m).

k. Unwarranted and undeserved negative performance ratings

It is alleged in paragraph 7(n) that in January, the Respondent give 31 employees "inferior performance evaluations and assigned unwarranted and undeserved negative performance ratings." This allegation as to five employees was withdrawn.

There is no question that the Respondent initiated a performance review for each employee beginning in about April 1998 and these reviews were finalized in late January 1999. Each employee was given one of four ratings in each of 11 categories, as well as an overall rating, using the following standards:

> **E-exceptional:** Performance is exceptional and is recognizable as being far superior to others.
>
> **H-highly proficient:** Results clearly exceed position requirements. Performance is of high quality and is achieved on a consistent basis.
>
> **P-proficient:** Competent and dependable level of performance. Meets the performance standards of the job.
>
> **I-improvement required.** Performance is deficient. Improvement is necessary. Action plan is required.

Also on the form is a space for the rater to enter two specific examples of the employee's major accomplishments during the rating period, and to suggest specific areas needing improvement. There is also a space for the employee's comments and finally, an overall rating of exceptional, highly proficient, proficient or improvement required (action plan required). Each employee's annual merit increase is calculated from the performance review, with higher rated employees receiving greater increases.

According to the Respondent, all 350 employees at the facility were given a performance review; however, this matter concerns only employees in the bargaining unit sought to be represented by the Teamsters.

In the fall, review forms were given to first line supervisors, who completed them for the employees whom they worked with. How the supervisors picked whom to rate was not very definitive; however, they did so and submitted first drafts by early November. These drafts were reviewed by Taylor and others in human resources for form (spelling, grammar, and the like) as well as consistency. The final version was completed and then checked by someone in corporate Human Resources who assigned a merit pay increase from zero to four percent, depending on the ratings in the 11 categories. The final review was given to each employee in late January or early February. Employees were allowed to question their ratings, and some did so, with the result that evaluations in one or more categories were changed, along with the merit increase.

The General Counsel seems to argue that the 26 employees finally named in paragraph 7(n) were each given inferior performance ratings because of their union activity as demonstrated by: (a) the fact that each signed a union card and attended meetings (and in some cases spoke in favor of the Union) and (b) the evaluation of each was negative. Additionally, the General Counsel seems to argue that as a class, the evaluations of union adherents were discriminatory, because evaluations given to employees who apparently did not support the union were uniformly better. Neither of these theories is supported by a preponderance of the credible evidence.

Ten of the 26 received highly proficient overall ratings. Though questioned at the hearing, counsel for the General Counsel did not answer how such a rating could be considered negative. Testimony from some of the individuals was to the effect that in their opinion, they should have been rated higher in one or more categories. But the subjective opinion of the rated individual that he or she should have been rated exceptional rather than highly proficient is, I conclude, insufficient to prove that the evaluation was an "unwarranted and undeserved negative performance rating." The same is true for the 15[6] who

[6] The performance review for Stephanie Calvert is missing from the record, though received into evidence. Since she received a 3.2-percent merit increase, consistent with the other evaluations, hers must have been proficient or possibly highly proficient.

received proficient evaluations. On the record here, I conclude that highly proficient and proficient evaluations are in fact positive.

It may be that some of the individuals believe they should have been rated higher; and perhaps their work would justify a higher rating. However, the Board does not operate as some kind of human resources review authority. Unless there is clear objective evidence that in spite of one's work history, the evaluation is patently too low, the Board will not second guess management.

I further reject the General Counsel's argument that a pattern of discrimination is proven by comparing these 26 evaluations with the evaluations of individuals not shown to have been union supporters. Though the General Counsel and the Respondent agree that 77 performance reviews were given to employees in performer/actor unit; I was only able to locate 56 in the record (plus 6 drafts which were not given). Of the 38 evaluations given to card signers, 16 were highly proficient, 15 proficient, and 6 improvement required.[7] Of the 20 evaluations for individuals not shown to be card signers, 1 was exceptional, 13 highly proficient, 4 proficient, and 2 improvement required. Such numbers do not demonstrate a clear pattern of treating card signers (assuming such was known to management) disparately from non card signers.

It does appear that the scoring was not consistent between raters. Focusing on attendance because it is the least subjective category, there are instances where one rater would give a proficient on attendance if the employee met the attendance requirements where another rater would give a highly proficient to an employee with a similar record. Nevertheless, most employees who received overall highly proficient ratings, had proficient in attendance. Thus, for an employee with an essentially perfect attendance record to have been rated proficient is not, as argued by the General Counsel, inexplicable. Indeed such would be the rating suggested under the guidelines. Perfect attendance merely "meets the performance standards of the job."

Notwithstanding some inconsistency between raters, I cannot conclude that the Respondent used the performance review system to retaliate against union supporters. Whatever inconsistency there is, I conclude, is attributable to the fact that the system was newly implemented. Accordingly, I conclude that the allegations in paragraph 7(n) should be dismissed.

l. Granting lower wage increases to the employees above

In paragraph 7(o), the General Counsel alleges that "the Respondent has granted lower wage increases to its employees named above in paragraph 7(n)." Unquestionably, annual merit increases were based on the performance evaluations; however there is no argument, or proof, that the merit pay formula was disparately applied. In short, the General Counsel's proof for this allegation is dependent on finding that the evaluations of the 26 employees named in paragraph 7(n) were unlawful. Having concluded that the Respondent did not discriminate against the 26 employees named in paragraph 7(n) in violation of the Act, I conclude that paragraph 7(o) should be dismissed.

m. Failing to grant wage increases to five employees

Laura Gubbins, Janet Lennox, Vicki Lobo, Kim Solsaa, and Jennifer Vandenberg each were given an improvement required overall rating on their respective performance evaluations. As such, they did not receive a merit pay increase. This is alleged to have been unlawful discrimination against them because of their activity on behalf of the Union.

As to Solsaa, the facts do not support the complaint allegation. After receiving her evaluation, Solsaa asked to speak to Gaffney, which she did 3 weeks later. Gaffney heard what in effect was Solsaa's appeal, and changed the rating in several categories, as well as her overall rating. Solsaa testified that she in fact received a retroactive pay raise. That her rating was changed is some evidence that the rating system was not used to retaliate against union supporters. If discrimination was the motive, her rating would not likely have been changed.

The General Counsel does not contend that refusing to give merit increases to those receiving improvement required rating is unlawful. Therefore, implicit in this allegation is the contention that these five employees were unlawfully evaluated too low. However, the fact that a few individuals who signed union cards received unsatisfactory performance evaluations does not of itself prove discrimination. As noted above, there is no pattern that those who signed cards were, as a group, treated disparately from those who apparently did not. Thus, to find that the allegation in this paragraph has been proved, one must look to the individual evaluations.

Each of the five signed an authorization card, attended one or more of the union organizational meetings. There was nothing in their activity on behalf of the Teamsters which particularly stands out or would suggest a motive for discriminating against any of these five.

The allegations as to these five then are based on their respective evaluations and the contention that they were objectively rated too low. Again, arguments could be made that the rater gave too low an evaluation in one or more categories. However, it is not the Board's function to reevaluate employees. The Board will consider the evidence to determine if the evaluation is patently unreasonable, for such tends to be some proof that the true motive was the employer's antiunion animus. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966). Although each might have been rated higher, I cannot conclude that any of these evaluations was patently unreasonable.

For instance, Lomax received improvement required in just three categories, yet had an overall improvement required. Thus her overall rating might have been better, but to so conclude would mean judging the relative weight to be given a particular category. Gubbins, Vandenberg, and Lobo had more improvement required entries than Lomax and their evaluations were not internally inconsistent. The General Counsel contends that Lobo should have been rated higher because in February the year before, she received a commendation for helping a non-English speaking guest. Though her action reflected well

[7] Fourteen of the card signers either received no evaluations, or were terminated before the evaluation process was finalized.

on the Respondent, a single event one year previously does not tend to prove that her evaluation was discriminatory.

In short, I conclude that the General Counsel failed to establish that Gubbins, Lennox, Lobo, Solsaa, or Vandenberg were discriminated against with regard to their performance reviews. It follows that the Respondent not violate the Act by denying them merit increases.

n. Placing Gubbins, Lennox, Lobo, Solssa, and Vandenberg on 60-day reevaluation plans

Consistent with the Respondent's performance review policy (about which there is no complaint) employees receiving an overall rating of improvement required must submit to a 60-day action plan after which the employee is reevaluated. Inasmuch as I have concluded that the evaluations of these five employees were not discriminatory, I conclude that requiring them to submit to an action plan and to be reevaluated at the end of 60 days was not unlawful. (Presumably, Solssa did not undergo the action plan and reevaluation.)

o. The discharges of John Stepp and Nick Prvulov

John Stepp and Nick Prvulov were both reasonably active on behalf of the Teamsters, passing out authorization cards and attending meetings. And their activity was known. For instance, one day on leaving the facility, Prvulov emptied his pack for inspection and there were many authorization cards, which event was observed by a supervisor.

In December 1998 both Stepp and Prvulov were injured while working and until their terminations in April 1999, they were on workmen's compensation administrative leave. In April, Stepp received a letter from the Respondent (Prvulov did not pick up his registered letter from the post office) which stated that due to the fact he had been off work for l6 weeks, he was being terminated.

The Respondent contends that the terminations of Stepp and Prvulov were not motivated by their union activity, but were the result of a consistent companywide policy to terminate anyone who had been off work for l6 weeks within a rolling 12-month period.

Prior to January 1999, the Respondent's policy in this regard had been to terminate employees after being off work for 26 weeks. Then during a meeting of senior human resources personnel in January, it was determined to reduce the time to 16 weeks. This was after the first election (at which the Teamsters received a majority of votes counted, and but for the action of the Board agent might have been certified) and before the second. The policy change was effective March 1. The second election was March 4 but Stepp and Prvulov were not affected until April.

The General Counsel argues that the change in policy must necessarily have been conceived in order to "quickly terminate pro-Teamster employees," presumably meaning Stepp and Prvulov, since they were the only two card signers affected by this change in policy. The problem with this argument is two fold. First, when the new policy was agreed on at the managers' meeting in January, there is no evidence that the Respondent had any way of knowing how much longer Stepp or Prvulov would be on administrative leave. At the time each had been off less than 4 weeks. Second, if, in fact, the Respondent sought to terminate Stepp and Prvulov by changing its administrative leave policy, it would have made the new term sufficiently short so as to insure that Stepp and Prvulov would not be eligible to vote in the second election. They both were eligible and voted.

Changing an administrative policy which could affect whether bargaining unit employees might be terminated, during an ongoing organizational campaign is certainly suspicious. Nevertheless, an employer has the right to do so, so long as such changes are not motivated by antiunion considerations. In this case, there is no direct evidence of an unlawful motive, and some evidence that the policy change was based on business considerations. Reducing administrative leave from 26 to 16 weeks is not patently unreasonable. And the policy change was companywide, not just affecting STTE employees. To conclude that the policy change here was violative of the Act (which would be necessary in order to find a violation with regard to the Stepp and Prvulov terminations) would be to conclude that a company cannot make policy changes during ongoing union campaigns regardless of motive. I reject such a conclusion. Indeed, the General Counsel does not argue that changing the policy was per se a violation—only that its effect caused the termination of two union activists and for this reason must have been implemented with a discriminatory motive.

Though finding that Stepp and Prvulov were known supporters of the Teamsters and gave testimony in Case 28–CA–25592, I conclude that their terminations were based on the Respondent's lawful change administrative leave policy and were not violative of Section 8(a)(3) or (4) of the Act.

4. Report on objections

The Teamsters filed 34 objections to the results of the second election held on March 4, many of which track allegations in the consolidated complaint and some of which do not. The Regional Director entered an "Order Consolidating cases, Directing Hearing on Objection and Challenged Ballots." At the hearing, counsel for the Teamsters withdrew those objections which were not also alleged to be unfair labor practices. Thus the objections issue is whether the unfair labor practices found are sufficient to set aside the second election. I conclude they are.

Although the complaint alleges numerous unfair labor practices which I find did not occur, those which are found are sufficient to conclude that the second election was not conducted in an atmosphere free of coercion. Accordingly, I conclude that the results of the second election should be set aside and a third election ordered.

No specific evidence was submitted with regard to the challenges. Leads were challenged, as were individuals who were no longer employed and were therefore not on the eligibility list. Since I conclude that the election should be set aside, the challenged ballot issues are moot.

5. Bargaining order

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court ruled on the propriety of the Board entering a bargaining order where the majority of bargaining unit employees had signed authorization cards and the employer had com-

mitted unfair labor practices. The Court considered three types of situations: (1) cases which involve such outrageous and pervasive unfair labor practices that traditional remedies would be insufficient to cease the effects of that activity; (2) cases where the unfair labor practices are less extraordinary, yet have the tendency to undermine the union's majority and impede the election process; and, (3) where the unfair labor practices are minor and insufficient to support a bargaining order. In the first two categories of cases, the Court held that, on balance, a bargaining order would be the appropriate remedy, but not in the third. This is the third type of case.

I conclude that at all times material, and especially from and after the first election on December 14, the Teamsters had designations of representation from a majority of the bargaining unit—52 cards of 96, the number of valid votes cast in the first election plus challenges.

The Respondent contends that many of the authorization cards were obtained by fraud and therefore should not be counted; however, counsel offered, at best, limited support for this assertion. Each card received in evidence, I conclude, was a reliable indicator of the signatory's desire to be represented by the Teamsters, notwithstanding that some employees might also have been told that the card could be used for a showing of interest. The clear language on the cards designates the Teamsters as the employee's bargaining agent. I conclude that any testimony that an employee was told the sole purpose of the card was to get an election was ambiguous and not sufficient to reject a card. As the Supreme Court noted in *Gissel*, employees are bound by the clear language of what they sign. Only in the strongest cases will a card with the language of the cards here be set aside because of what the solicitor said.

The Respondent also contends that the actor/performer bargaining unit exceeded 100, and therefore, presumably, the Teamsters did not have majority representation as demonstrated by authorization cards. Since the only record evidence shows that the bargaining unit was less than 100, I conclude that in fact the Teamsters had a majority of authorization cards. The Respondent had the burden of proving that the unit was larger than 100 and it failed to do so. The assertion of counsel is not sufficient proof.

Nevertheless, I conclude that this case falls into the third category described by the Supreme Court. The unfair labor practices found are not "hallmark" violations. For instance, the discharge of Jordan was predicated on a reasonable interpretation of his rights under *Weingarten.* At most the unfair labor practices found represent "stepping over the line" during a contested organizational campaign. They are not sufficient to justify other than the traditional remedy and ordering a rerun election. *Pyramid Management Group,* 318 NLRB 607 (1995), where the unfair labor practices found, including 2 discharges in a unit of 69 employees, were deemed insufficient to order bargaining.

Accordingly, I conclude that the Section 7 rights of employees will be protected here by ordering a notice posting followed by a rerun election.

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering Tania Lonkouski and Tracy Jordan reinstatement to their former jobs, or if those jobs no longer exists, to a substantially equivalent position of employment, and make them whole for any loss of earnings and other benefits they may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The election held on March 4, 1999, will be set aside and Case 28–RC–5692 remanded to the Regional Director for Region 28 to conduct a rerun election at an appropriate time.

[Recommended Order omitted from publication.]